

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE BURLINGTON INSURANCE
COMPANY,

Case No: 18-006832-CB
Hon. Brian R. Sullivan

Plaintiff/Counter-Defendant

-vs-

INTERNATIONAL FREE & ACCEPTED
MODERN MASONS, a Delaware
Corporation,

Defendant/Counter-Plaintiff/
Cross-Defendant,

and

FABIAN, SKLAR, KING & LISS, P.C.,
a Michigan corporation,

Defendant/Cross-Plaintiff,

**ORDER GRANTING BURLINGTON'S
MOTION FOR SUMMARY DISPOSITION**

At a session of said Court, held in the City
County Building, City of Detroit, County of
Wayne, State of Michigan, on
8/28/2019

PRESENT: HONORABLE BRIAN R. SULLIVAN

The issue presented in this case is whether the two year statute of limitations in the contract controls counter-defendant's cause of action or whether the tolling provision of MCL 500.2833(1)(q) extends the filing time of plaintiffs complaint until after the claim is denied by the insurer.

The court concludes the policy issued by plaintiff, a surplus lines carrier, is not subject to the tolling provision of the statute. The contractual state of limitations applies and plaintiff's motion for summary disposition is granted for that reason.

FACTS

Burlington Insurance Company (Burlington) filed this case to interplead insurance proceeds. The check was payable to defendant law firm of Fabian, Sklar, King & Liss, P.C. (Fabian), who procured these additional proceeds for plaintiff on behalf of the International Free & Accepted Modern Masons (IFAMM). A fire occurred at a building owned by IFAMM and insured by plaintiffs. Burlington made an initial payment, IFAMM sought more money, but plaintiff did not pay. IFAMM retained Fabian. Fabian retained an expert, gathered evidence, presented an additional claim and received additional money (\$93,203.94) for IFAMM from plaintiff on February 8, 2018. IFAMM was not satisfied with that additional payment and refused to negotiate the check and refused to pay Fabian. The matter stalled. Burlington sued and deposited the payment in court. IFAMM filed a counter-claim. Burlington Insurance Company filed a motion for summary disposition on that counter-complaint on the basis that IFAMM is contractually barred from filing suit against it to recover for fire damage. Section D of the Commercial Property Condition provides that legal action against Burlington may not be brought after two years after the date in which the direct physical loss or the damage occurred. Plaintiff Burlington asserts

the fire occurred on April 21, 2016 and the counter-claim was brought in July of 2018, past that two year limitations. IFAMM did not file suit within that time. IFAMM responds that MCL 500.2833 controls under the Insurance Code of 1956. IFAMM asserts that the time for commencing of an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability.” MCL 500.2833(1)(q).

The controversy boils down to whether the contractual period applies because plaintiff is a surplus lines carrier or whether the statute controls as IFAMM contends.

MCL 500.2833(1)(q) provides an action must be commenced within one year after the loss or within the time specified in the policy, whichever is longer. The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability.

It is undisputed the insurer never denied liability on this claim.

The court concludes plaintiff is a surplus lines carrier. The contract between the parties controls the filing date for a claim and IFAMM filed after the contractual limit. The court grants plaintiff's motion for summary disposition.

STANDARD OF REVIEW

1. MCR 2.116(C)(7)

Plaintiff's motion is brought under MCR 2.116(C)(7). Plaintiff claims a claim is barred by the statute of limitations contained in the contract of insurance. In reviewing a motion pursuant to MCR 2.116(C)(7) the court must accept all of counter-plaintiffs well pled allegations as true and in a light most favorable to the non-moving party. The court is also entitled to consider affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties to determine whether or not there is any genuine issue as to material fact in relation to the assertions. See *Nuculovic v Hill*, 287 Mich App 58, 61 (2010); *Hanley v Mazda Motor Corp.*, 239 Mich App 596, 600 (2000). All documentary evidence and materials are considered only to the extent they are admissible in evidence. *In Re: Miltenberger Estate*, 275 Mich App 487, 51 (2007).

2. MCR 2.116(C)(8)

A motion brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the pleadings. *Johnson/McIntosh v Detroit*, 266 Mich App 318, 322 (2005). The court takes all well plead allegations as true.

3. MCR 2.116(C)(10)

MCR 2.16(C)(10) tests the factual support a claim. *Campbell v Kovich*, 273 Mich App 227, 229 (2006). The motion should be granted when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Med Center v Allstate Insurance Company*, 277 Mich App 51, 56 (2007).

When the burden of proof at trial rests on the non-moving party, the non-movant may not rest on the allegations or denials in the pleadings but, by documentary evidence, set forth specific facts demonstrating that there is a genuine issue of fact for trial. *Healing Place*, 277 Mich App at 56. Such evidence is only considered to the extent it is admissible. MCR 2.116(G)(6). *Campbell*, 273 Mich App at 230. A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the non-moving party, leaves open an issue upon which reasonable minds could differ. *Healing Place*, 277 Mich App at 56.

DISCUSSION

The case of *Klas Management, LLC and Klas Apartments, LLC v. Chubb Custom Ins Co*, 2018 WL3159676 is instructive. In *Klas* the plaintiff apartment complex suffered hail damage. It had a dispute with its insurance company as to the amount of damages. *Klas* waited until after the two year date of loss to bring suit. *Klas* argued it was entitled to the same statutory tolling provision IFAMM argues is applicable here. *Klas* argued the insurance policy's (contractual) limitation was contrary to MCL 500.2833(1)(q) and the statute controlled. Moreover, like IFAMM, Chubb never formally denied liability and the *Klas* asserted the suit was timely.

Chubb claimed it was a "surplus line carrier" to which the Michigan Insurance Code does not apply. The court agreed with Chubb.

Surplus line insurance is defined as insurance obtained from an unauthorized insurer which forms are not subject to the insurance code. See MCL 500.1903 et seq; 500.1904(2). MCL 500.1920 requires a bold declaration on page one of the common policy declarations: “This insurance has been placed with an insurer that is not licensed by the State of Michigan. In case of insolvency, payment of claims may not be guaranteed.”

In this case plaintiff attached an exhibit from the Michigan Department of Insurance and Financial Services which identifies Burlington Insurance Company as a surplus lines insurer. A surplus lines insurance carrier is not authorized to independently transact traditional insurance business in Michigan but can write insurance business under the Surplus Lines Insurance Act. MCL 500.1903(1)(a); *Royal Property Group, LLC v Prime Insurance Syndicate, Inc.*, 267 Mich App 708, 724-725 (2005). Surplus Lines Insurance carriers can issue insurance only when coverage is not available from an authorized carrier MCL 500.1910(1). The Surplus Lines Act at MCL 500.1904 exempts policies issued by the surplus line carriers from the mandatory language of the insurance code. MCL 500.1904 provides:

(2) Forms used by unauthorized insurers pursuant to this chapter shall not be subject to this Code, except that a policy shall not contain language which misrepresents the true nature of the policy or class of policies.

Burlington has demonstrated it is a surplus lines carrier and as such is not subject to the other provisions of the insurance code. This means that Burlington is not subject to the statutory tolling provision. Even though Burlington never denied IFAMM’s claim it is not

subject to the statutory tolling provision.

The plain language of the policy provides there is a two year statute of limitations from the date of loss to the filing of a complaint.

Insurance policies are contracts subject to the same principles of construction as contracts. See *Titan Insurance Company v Hyten*, 491 Mich 547, 554 (2012). Insurance contracts are read as a whole giving effect to every word, phrase and clause. *Klapp v United Insurance Group Agency, Inc.*, 468 Mich 459, 467 (2003). If the policy language is clear the court must enforce the specific language of the policy. *Heniser v Frankenmuth Mutual Insurance Company*, 449 Mich 155, 160 (1995). The court must give the words the policy their words their plain meaning an ordinary meaning. See *Rory v Continental Insurance Company*, 473 Mich 457, 464 (2005). The courts must interpret the policies according to their unambiguous terms. *Rory, supra*, 473 Mich at 468.

There is no public policy in Michigan precluding the parties from having a shortened statute of limitations than specified by statute. *Rory, supra*, 472 Mich at 471; *Camelot Excavating Company, Inc. v St. Paul Fire and Marine Insurance Company*, 410 Mich 118, 139 (1981). The law is replete with examples of contractually shortened statute of limitations period.

Burlington's two year statute of limitations in this case is clear and unambiguous.

Since Burlington is a surplus lines carrier it is not subject to the tolling provision contained in the statute of the Insurance Code. See MCL 500.2833(1)(q). Since the counter-claim was more than two years after the fire it is barred pursuant to MCR 2.1116(C)(7).

and

IT IS SO ORDERED.

/s/ Brian R. Sullivan 8/28/2019

BRIAN R. SULLIVAN
Circuit Court Judge

ISSUED: